Despite the criticisms made by counsel for the plaintiff as regards the explanation offered for the transfer to the fifth defendant, I am firmly of the view that the evidence, taken as a whole, gets nowhere near to proving that the transfer was fraudulent within the language of Lord Lindley. I see nothing improbable in the suggestion that at the time of the transfer, the boards of the fourth and the fifth defendants had hoped and perhaps even expected that the plaintiff would not seek an order for specific performance of the contract of sale but would confine his suit to claims against the fourth defendant for refund of the deposit and payment of damages, regard being had to the events at the meeting of 1976 and the inaction and delay on the part of the plaintiff following expiry of the second caveat lodged against the disputed property, *and/or* they might have anticipated that the plaintiff would not succeed in his claim for specific performance. But, that in itself does not justify a finding that the designed object of the transfer was to cheat the plaintiff of a known existing right and a deliberate and dishonest trick to cause his interest not be registered. There must be evidence from which a court can properly infer such an intent and the Privy Council has held that the onus of proof of fraud even in a civil case in Malaysia is proof beyond reasonable doubt (*Saminathan* v *Pappa*[27] per Lord Diplock at p 126). It is not enough to show that the transfer had *the effect* of depriving the plaintiff of a known existing right. It must be demonstrated that the transfer was executed with the *intention* of cheating the plaintiff of such right. Furthermore, it is immaterial to decide whether there were other intentions and equally immaterial to decide which was the dominant intention. The intention to cheat must be one which has a substantial influence on the decision to make the transfer.

In all the circumstances, I find that the charge of fraud against the fourth and the fifth defendants, whether separately or jointly, has not been made out, with the result that the suit against them is also dismissed with costs.

Order accordingly.

Solicitors: *Mahinder Singh Dulku & Co; Thillaimuthu & Phock Kin; Shearn Delamore & Co; Lim Cheng Poh, Lim & Rahim; Abdul Aziz, Ong & Co.*

Reported by *PS Ranjan*

Lim Ah Hun v Pendaftar Hakmilik Tanah, Pulau Pinang & Anor

HIGH COURT (PENANG) — ORIGINATING MOTION NO 25-2-90
MOHAMED DZAIDDIN J
18 MAY 1990

Land Law — Registrar's caveat — Appeal against refusal to cancel — Whether applicant proper person to bring this appeal — Whether registrar's earlier decision to enter caveat can be reversed in view of new facts

This is an appeal by the applicant under s 418 of the National Land Code 1965 ('the Code') against the decision of the Registrar of Titles, Penang, in refusing to cancel the registrar's caveat entered on 3 December 1989 on the register document of title to a piece of property lot 1278, North East District, Penang ('the said property'). On 24 August 1989, the applicant entered into an agreement with Delima Suria Sdn Bhd, the registered proprietor, to purchase the said property for $180,000. Upon the execution of the purchase agreement, the applicant paid to the vendor's solicitors a deposit of $18,000 being 10% of the purchase price. On 8 September 1989, the applicant's solicitors entered a private caveat against the said property on behalf of the applicant. The balance of the purchase price was paid on 21 November 1989 after both parties had executed the transfer form. However, upon presentation by the applicant's solicitors of the documents to the Land Office, Penang, for registration, they discovered a registrar's caveat registered on 3 December 1989. The applicant informed the vendor's solicitors of the registrar's caveat, who then wrote to the registrar on 22 December 1989 to cancel the said caveat. On 22 January 1990, the registrar replied stating that the registrar's caveat could not be cancelled without the permission of the caveator. This appeal is based on the ground that the registrar had wrongly exercised her powers under s 320(1) of the Code bearing in mind that the applicant, as a bona fide purchaser for value of the said property, has no notice of any purported fraud or improper dealing in respect of the said property.

Held, allowing the applicant's appeal:

(1) On the facts, the applicant, being the beneficial and equitable owner of the said property, is an 'aggrieved person' within the meaning of s 418(1) of the Code. Thus under s 321(3)(c), the registrar can cancel the registrar's caveat pursuant to an order of court made under s 418 by any person aggrieved by the decision of the Director, Registrar or Land Administrator.

(2) In determining whether or not to exercise the power conferred upon him by s 320(1)(a), the registrar can only act upon such information as is available to him. This will consist of what is registered in the register itself or filed in the registry, together with such additional information as may have been supplied to him by whoever has requested him to exercise his power to enter a registrar's caveat. Further, before the registrar exercises his power of entry, he must be satisfied objectively with the information and/or facts supplied to him by any proper applicant.

(3) Based on the new facts, the information supplied by the second respondent to the registrar in support of his application and upon which information the registrar had acted upon in registering the registrar's caveat with respect to the said property was misleading and is no longer valid. Further, the new facts seem to show no improper dealing at all concerning the said

property. In view of the new facts, the court can, in the exercise of its discretion, reverse the registrar's earlier decision to register the registrar's caveat and therefore direct that the registrar's caveat be cancelled forthwith.

Cases referred to

1 *Registrar of Titles, Johore* v *Temenggong Securities Ltd* [1976] 2 MLJ 44 (folld)
2 *Eng Mee Yong & Ors* v *Letchumanan* [1979] 2 MLJ 212 (refd)
3 *Re Taupo Totara Timber Co Ltd* [1943] NZLR 557 (refd)

Legislation referred to

National Land Code 1965 ss 320, 321, 418

Tan Phock Kin for the appellant applicant.
Asmadi bin Hj Asnawi for the first respondent.
Anwar Raja for the second respondent.

Cur Adv Vult

Mohamed Dzaiddin J: This is an appeal brought by the applicant by way of notice of originating motion under s 418 of the National Land Code 1965 ('the Code') against the decision of the Registrar of Titles, Penang, made on 22 January 1990 in refusing to cancel the registrar's caveat Jilid No 26 Folio 199 entered on the register document of title to a piece of property known as lot no 1278 TS 9W, North East District, Penang ('the said property') on 3 December 1989.

This appeal is based on the ground that the registrar had wrongly exercised her powers under s 320(1) of the Code bearing in mind that the applicant, as a bona fide purchaser for value of the said property, had no notice of any purported fraud or improper dealing in respect of the said property.

The facts

On 24 August 1989, the applicant entered into an agreement with Delima Suri Sdn Bhd, the registered proprietors to purchase the said property for $180,000. Upon the execution of the purchase agreement, the applicant paid to the vendors' solicitors, K Vijaya & Co, a deposit of $18,000 being 10% of the purchase price. On 8 September 1989, the applicant's solicitors entered a private caveat on his behalf on the register document of title to the said property. Then, on 21 November 1989, the applicant paid the balance of the purchase price after both parties had executed the transfer form in Form 14A of the Code. However when the applicant's solicitors presented the documents to the Land Office, Penang, for registration they discovered the existence of the registrar's caveat registered on 3 December 1989. They then informed the vendors' solicitors about the registrar's caveat on the said property. On 22 December 1989, the vendor's solicitors wrote to the registrar requesting her to cancel the said caveat. On 22 January 1990, the registrar replied stating that it could not be cancelled without the permission of the caveator.

At the outset of this proceeding, Encik Anwar Raja, counsel for the second respondent, raised a preliminary point which I shall deal first. He submitted that the applicant was not a proper party to bring this appeal because he is not the registered proprietor of the said property. Counsel relied on s 321(3)(b) of the Code.

Section 321(3) states:

> A Registrar's caveat shall continue in force until it is cancelled by the Registrar —
>
> (a) of his own motion; or
> (b) on an application in that behalf by the proprietor of the land affected; or
> (c) pursuant to any order of the Court made on an appeal under section 418 against his decision to enter the caveat, or his refusal of any application for its cancellation under paragraph (b).

Clearly, from the above subsection, the registrar's caveat may be cancelled in any of the three ways: (i) either on his own motion, or (ii) on the application made by the registered proprietor, or (iii) pursuant to order of court on appeal under s 418 against his decision to enter a caveat or his refusal made in that behalf by the proprietor. In the instant case, sub-para 3(c) is material because this paragraph refers specifically to an appeal under s 418. Now, sub-s (1) of s 418 reads:

> Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any Land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the Court.

Therefore, in the light of s 418, the applicant comes within sub-s (3)(c). On the facts, the applicant, being the beneficial and equitable owner of the said property, is an 'aggrieved person' within the meaning of s 418(1) of the Code. Thus, under s 321(3)(c) the registrar can cancel the registrar's caveat pursuant to an order of court made under s 418 by any person aggrieved by the decision of the Director, Registrar or any Land Administrator.

Section 320(1)(a) of the Code enacts that subject to sub-s (2), a registrar's caveat may be entered in respect of any land wherever such appears to be necessary or desirable for the prevention of fraud or improper dealing.

Per Lord Diplock in *Registrar of Titles, Johore* v *Temenggong Securities Ltd*[1] at p 47:

> In determining whether or not to exercise the power conferred upon him by the section, the registrar can only act upon such information as is available to him. This will consist of what is registered in the register itself or filed in the registry, together with such additional information as may have been supplied to him by whoever has requested him to exercise his power to enter a registrar's caveat.

Encik Wong Kim Fatt in his article 'Registrar's Caveat Amended' in [1980] 1 MLJ vii at p viii further stated that before the registrar exercises his power of entry, he must

be satisfied objectively with the information and/or facts supplied to him by any proper applicant. The request for entry may be made by letter to the registrar, who may require the information and/or facts to be verified by statutory declaration. If the registrar is doubtful whether he should comply with or reject the application, he may seek the legal opinion of the State Legal Adviser. In the present case, what is the information available to the registrar which he acted upon when registering the registrar's caveat? Puan Habibah bte Abdul Hadi, the Deputy Director of Land Titles, Penang, deposed in her affidavit dated 14 February 1990, that after she received a letter from the second defendant's solicitors dated 3 December 1989, she acted accordingly in order to prevent any further dealings over the said property. The said letter was accompanied by a police report. Further, it mentioned that a court action was in the process of being taken by the second respondent concerning the said property. I pause here to state that an action had been commenced by the second respondent and his sister against the vendor, Delima Suria Sdn Bhd, and its managing director, Mohamed Tahir bin Sultan, concerning the said property in the Penang High Court (Civil Suit No 22-63-90). I shall, however, deal with the facts of this civil action in a short while.

According to Puan Habibah, based on the solicitor's letter and the police report (Datuk Keramat Police Report No 3335/89) lodged by the second respondent against the vendor and Mohamed Tahir bin Sultan alleging a fraudulent transfer made by them to the applicant, she concluded that she was satisfied that there was sufficient and valid ground for her to exercise her powers under s 320(1)(a) of the Code to prevent fraud or improper dealing. Encik Asmadi, Federal Counsel, for the first respondent, submitted that the registrar had acted in good faith when she registered the said caveat. She had carefully examined the solicitors' letter as well as the police report before caveating the said property. These documents were sufficient for her to arrive at her decision. Relying on the authorities in *Eng Mee Yong & Ors* v *Letchumanan*[2] and *Re Taupo Totara Timber Co Ltd*,[3] counsel submitted that this court should not interfere with the registrar's exercise of her discretion unless her act to enter the registrar's caveat was clearly wrong. Finally, counsel submitted that the registrar's caveat should remain because there was a serious question to be tried affecting the said property.

Based on the information available to the registrar, I am of opinion that she exercised her discretion to enter the registrar's caveat correctly. The information in the solicitors' letter and the police report constitutes sufficient material for her to suspect that there was something 'hanky panky' going on concerning the said property.

However, in view of the subsequent information emerging regarding the true position of the dispute between the registered proprietor and the second respondent as pleaded in Penang High Court Civil Suit No 22-63-90, can this court now, in the exercise of its discretion, reverse the earlier decision? In my opinion, the case of *Registrar of Titles, Johore* v *Temenggong Securities Ltd*[1] provides the answer. There, the Federal Court in allowing the appeal of Temenggong Securities against the decision of the High Court held that the vendors (Li-Ta), having parted with their interest in the said land to the appellant, were bare trustees and had no interest in the land over which a valid caveat would be lodged. This was because although Li-Ta were judgment debtors of the government, after 19 December 1972 (the date judgment was obtained), Li-Ta no longer had interest in the said land. As stated by Lord Diplock in the Privy Council decision at p 47:

> Upon appeal the Federal Court did not deal specifically with the general proposition accepted by Pawan Ahmad J. They allowed the appeal upon a narrower ground arising on the particular facts of the instant case — viz, that by the time the registrar's caveat was entered Li-Ta had already ceased to have any interest in the land that was capable of being made available in execution to satisfy its judgment debts, since on completion of the contract of sale on 22 September 1972, and payment of the purchase price by Temenggong, Li-Ta had parted with all beneficial interest in the land and held the registered title as bare trustee for the purchaser.

Thus, the appeal against Pawan Ahmad J's decision was allowed by the Federal Court because of the change of circumstances affecting the ownership of the property between the date of sale by the vendors, Li-Ta and the date of judgment against them.

In Civil Suit No 63 of 1990, the case is brought by the second respondent with his sister, Zainab Bee bte Sultan against the vendor, Delima Suria Sdn Bhd and Mohamed Tahir bin Sultan. The plaintiffs claim for the following reliefs:

(a) an injunction restraining the defendants by themselves their agents or otherwise from utilizing all the proceeds of the sale of the property known as lot no 1278 TS 9W, Pulau Pinang until the trial of this suit;

(b) an order restraining the defendants' solicitors Syarikat K Vijaya of Suit No 403, 4th Floor, Penang Chinese Town Hall, 22 Pitt Street, 10200 Penang from releasing to the defendants all the proceeds of the sale of property known as lot no 1278 TS 9W, Pulau Pinang until the trial of this suit;

(c) an order that the defendants do pay the plaintiffs 1/3 share each out of the total proceeds of the sale of property known as lot no 1278, TS 9W, Pulau Pinang;

(d) an order that a reputed and certified public accountant be appointed to prepare audited accounts of the first defendant for the period 2 August 1984 to date of filing of this writ and thereafter to declare dividends

and other benefits due to the plaintiffs from the defendants.

By their statement of claim, the plaintiffs who were the registered co-owners of the said property together with the second defendant, each having a third undivided share alleged that at the request of the second defendant, the co-owners agreed to charge their shares of the said property to Hongkong and Shanghai Bank as security for a loan given by the bank to the first defendant, Delima Suria Sdn Bhd. To facilitate the loan transaction, the plaintiffs gave their powers of attorney to the second defendant, the person in control of the first defendant. The plaintiff further stated that on 2 August 1984, they transferred their respective shares to the first defendant for the purpose of the bank loan. However, since 2 August 1984, the plaintiffs alleged that they had been denied their rights as shareholders of the first defendant because the second defendant had refused to inform them the true state of affairs of the first defendant. Finally, when the plaintiffs made a search at the Registry of Titles, Penang on 22 November 1989, they were informed that the said property had been sold to the applicant for $180,000 where a deposit, $18,000 had already been paid to the defendants. The plaintiffs maintained that they never gave consent to the defendants to sell the said property to anyone. It is lastly pleaded that since 2 August 1984, the plaintiffs had not been given any dividend or had derived any benefits from the first defendant, Delima Suria Sdn Bhd.

From the statement of claim, it is clearly seen that the cause of action is not founded on fraud or allegation of improper dealings in respect of the said property. Nor are they claiming for the return of the said property. The plaintiffs' claim is for entitlement of their shares in the proceeds of sale of the said property and until this claim is determined by the court, they pray for a restraining order against the release of the said sum of $180,000 to the defendants. Looking at the averments and allegations in the statement of claim, they appear to be totally unrelated to the information stated in the solicitors' letter to the registrar and the allegations in the Police Report No 3335/89.

Therefore, based on the facts as gathered from the statement of claim in Civil Suit No 63 of 1990, it is my finding that the information supplied by the second respondent to the registrar in support of his application and upon which information the registrar had acted upon in registering the registrar's caveat with respect to the said property was misleading and is no longer valid. On the other hand, these new facts seem to show no improper dealing at all concerning the said property. In my view, had the registrar been informed of the true facts of the plaintiffs' claim against the defendants she would not have come to her conclusion and exercised her discretionary powers under s 320(1)(a) of the Code. Hence, in view of the plaintiffs' action in Civil Suit No 63 of 1990, the registrar's caveat dated on 3 December 1989 can no longer remain. In the result, I allow this appeal and direct that the said registrar's caveat be cancelled forthwith. In addition, I make an order that the costs of this appeal be paid by the second respondent to the applicant to be taxed by penolong kanan pendaftar. The prayer for damages is disallowed.

Appeal allowed.

Solicitors: *Thillaimuthu & Phock Kin; Shaik Anwar Raja.*

Reported by *Zarinah Marican*

Khoo Teng Seong v Khoo Teng Peng

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NOS S7-25-69-89 AND 25-89-89
LIM BENG CHOON J
15 MAY 1990

Land Law — Private caveat — Land part of estate of deceased person — Beneficiary of estate entitled to a share of general residue of estate — Administration of estate not completed — Whether beneficiary has a caveatable interest in the land — National Land Code 1965, s 323

The respondent in Originating Motion No 25-69-89 had entered private caveats against certain lands. The respondent in Originating Motion No 25-89-89 too had entered caveats against the same lands. The applicant applied in each case for an order, inter alia, for the removal of the caveats.

The two respondents were among the beneficiaries of the estate of one Khoo Boo Gong, deceased, who by his will had given certain directions to the executors and trustees regarding the estate, including that they were to make payment to the beneficiaries of the balance of his ready moneys as soon as possible and in the same manner to pay to the beneficiaries from time to time without undue delay upon conversion into money of any part or the whole of his other assets. The applicant, as executor and trustee, had granted an option to a certain company to purchase the lands, which option was exercised resulting in the execution of a sale and purchase agreement between the applicant and the company. Before the lands could be transferred to the company, the respondent in Originating Motion No 25-69-89 lodged the caveats on the grounds that: (1) he was a beneficiary of the estate; (2) he held a share in the proceeds of the sale of the lands; and (3) the applicant had failed to administer the estate in accordance with the will of the deceased. The respondent in the other originating motion lodged the caveats on the grounds that: (1) he was a beneficiary of the estate of the deceased; and (2) the purchase price was below the open market value of the lands and hence that it was unreasonable to sell the lands at such price.

It was submitted for the applicant that the two respondents had no caveatable interest in the lands since each of them was entitled to only five shares of the residuary properties and the lands were not held in trust specifically for the respondents and hence they could not claim any interest in the said lands.